Supreme Court, U.S.
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No. 03-62

IN THE

Supreme Court of the United States

PIER CARLO FALOTTI,
Petitioner,

v.

ORACLE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in this diversity case, the Ninth Circuit properly applied California state law to a private contract that contained a California choice-of-law clause and an integration clause providing that the contract constituted the parties' entire agreement on the subject at issue?

LIST OF PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The names of all parties appear in the case caption. Respondent Oracle Corporation is a publicly-traded company whose stock is listed on the NASDAQ exchange. Respondent has no parent company and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW AND JURISDICTION

The opinions below and the basis for this Court's jurisdiction are adequately set forth in the Petition. Pet. at 1-2.

STATUTES INVOLVED

There are no federal statutes involved in this case.

COUNTER STATEMENT OF THE CASE

1. This case involves the claim of Pier Carlo Falotti, a former senior executive of Oracle Corporation ("Oracle" or "Respondent") based in Switzerland, to $85 million worth of stock options that had not yet vested under Oracle's 1991 Long-Term Equity Incentive Plan ("Stock Option Plan")

when Oracle fired him. Under the express terms of the Stock Option Plan and its related Grant and Exercise Agreements (collectively, the "Stock Option Agreement"), vesting occurs only if an optionee remains a "full-time employee" on the vesting dates established by the grant. The Stock Option Agreement contains a California choice-of-law provision and is fully integrated—*i.e.*, it states that it constitutes the parties' entire agreement on the subject of stock options and supersedes any prior agreements on that subject. Pet., App. B at 24a-26a.

The Stock Option Agreement gives the Committee on Compensation and Management Development of Oracle's Board of Directors ("Compensation Committee") broad discretion to determine when employment ceases for purposes of the Stock Option Agreement. The unanimous decision of the Ninth Circuit does nothing more than hold as a matter of California law that the Compensation Committee did not abuse its discretion when it determined in Mr. Falotti's case that his eligibility to vest in stock options ceased when he ceased to perform any services for any Oracle entity. Pet., App. A at 10a-17a.

2. When recruited to join Oracle in 1996, Mr. Falotti was a sophisticated business executive with nearly 25 years of experience managing European operations for U.S. technology companies. Following lengthy negotiations, on July 10, 1996, Mr. Falotti accepted Oracle's written offer of employment as Oracle's Senior (later, Executive) Vice President in charge of Europe, Middle East and Africa ("EMEA") at an annual salary, including incentives, of $1 million a year ("July 1996 Letter Agreement"). The July 1996 Letter Agreement provided that Respondent would request its Board of Directors' approval for an initial grant of 600,000 stock options, which, if granted, would be the subject of a separate agreement. The July 1996 Letter Agreement was for an indefinite term and provided that Oracle could terminate Petitioner with or without cause. Pet., App. A at 2a-3a.

In the negotiations, Mr. Falotti insisted upon having a separate employment contract that would be subject to Swiss law. However, unlike the July 1996 Letter Agreement with Oracle, none of the documents that comprised his agreement with Oracle's local Swiss affiliate, Oracle Software (Suisse) S.A. ("Oracle Switzerland"), made any mention of stock options. Pet., App. A at 4a, 9a. This intentional omission was an accommodation to Mr. Falotti, who had insisted that most of his compensation and *all* stock options be paid to him outside Switzerland "with no local or Swiss tax implications for myself." 7:ER1923.[1] By deliberately separating his stock options from the agreement with Oracle Switzerland in this manner, Petitioner paid no taxes in Switzerland or anywhere else on the more than $80 million in stock option income he received while he was employed by Oracle (and paid Swiss taxes on only a minor portion of his Oracle Switzerland salary). 9:ER2275-78.

3. As Petitioner repeatedly acknowledged in the proceedings below, neither his employment agreement with Oracle Switzerland nor Swiss law gave him any right to stock options. 12:ER3297; 4:ER920; 2:ER400. Instead, Mr. Falotti's right to vest in stock options depended entirely upon the terms of the Stock Option Agreement. That Agreement, as Petitioner concedes, contains a comprehensive integration clause and chooses California law. Pet. at 5. Under its express terms, an optionee is not entitled to vest in any remaining stock options once he "ceases to be employed." Pet., App. A at 4a. Anticipating situations such as this case presents, Section 6(k)(iv) of the Stock Option Plan states as follows:

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[1] Citations to materials not in the opinions below are to Petitioner's Excerpts of Record ("ER") submitted to the Court of Appeals. The citation format "7:ER1923" refers to Volume 7 of the ER, at page 1923.

> (k) Limitations on Exercise. Notwithstanding the exercise periods set forth in the Grant, exercise of an Option shall always be subject to the following:
>
> * * *
>
> (iv) The [Compensation] Committee shall have discretion to determine whether Participant has ceased to be employed by the Company or any Parent, Subsidiary or Affiliate of the Company and the effective date on which such employment terminated . . . .

7:ER1936 ¶ 6(k)(iv); *see also* 7:ER1947 ¶ 3.

4. By January 2000, Petitioner had agreed to step down as Executive Vice President in charge of EMEA effective May 31, 2000, the last day of Respondent's fiscal year. As that date approached without any agreement on his future duties or compensation, Mr. Falotti had ample reason to be concerned about his continued employment. After visiting Swiss employment counsel on the afternoon of May 29th (9:ER2299), Mr. Falotti made an urgent visit to his personal physician (whom he had not seen in three years) early on the morning of May 30th. He left twenty minutes later with a note stating that he had a "[t]otal incapacity to work" of indeterminate duration effective May 30, 2000. Mr. Falotti then went to work as usual, and he did not mention any illness or his doctor's certificate to anyone at Oracle or Oracle Switzerland. Pet., App. B at 28a, 55a.

5. In a telephone conversation on the afternoon of May 31, 2000, Lawrence J. Ellison, Oracle's Chairman of the Board of Directors and Chief Executive Officer, fired Mr. Falotti, relieving him of all responsibilities and authority and telling him not to return to the office. During this telephone call, Petitioner advised Mr. Ellison that he was immune from termination under Swiss law because he had a "headache." He said, "You don't work in Switzerland as long as I have without being familiar with Swiss law." Pet., App. B at 28a. Based on the substance and tone of the discussion,

Mr. Ellison did not believe that Mr. Falotti was sick. On the contrary, he believed that Mr. Falotti was wrongfully seeking to take advantage of Swiss law protections for employees who are medically incapacitated and that his assertion of illness was untrue. 10:ER2506.

As explained below, Petitioner may have a right of action to recover the wages and benefits he would have earned under his Swiss employment agreement if Oracle Switzerland failed to honor any applicable notice or "forbidden" period specified by Swiss law. *See* p. 7, *infra.* It is undisputed, however, that it was entirely proper and normal under Swiss law to relieve Mr. Falotti of his duties effective immediately and that Swiss law provides no remedy through which Mr. Falotti could obtain reinstatement. Pet., App. A at 9a. Accordingly, Oracle committed no wrongful act by permanently terminating Mr. Falotti's status as a full-time employee eligible to vest in stock options on May 31, 2000. Indeed, as the district court observed, Mr. Falotti's own Swiss law expert agreed that he was no longer a "full-time" employee after that date. Pet., App. B at 44a.

6. On June 22, 2000, Petitioner sought permission to exercise stock options that had not vested as of his May 31, 2000 termination date. The Compensation Committee considered the matter and, relying on its discretion under the Stock Option Agreement, unanimously concluded that, for purposes of the Stock Option Agreement, Mr. Falotti ceased to be employed on May 31, 2000 when he ceased to perform any services for any Oracle entity. Pet., App. A at 4a, 9a. The Committee's decision was based on its fundamental recognition that stock options are incentives for *future* contributions and not earned benefits for past service. Pet., App. B at 36a, 47a-49a. Both the Ninth Circuit and the district court held that the Compensation Committee properly exercised its discretion in making this determination and did not violate the duty of good faith and fair dealing imposed by California law. Pet., App. A at 17a; App. B at 36a, 42a-43a.

Pursuant to Rule 15.2 of the Rules of this Court, Respondent corrects and supplements Petitioner's Statement of the Case as follows:

1. Petitioner represents, without reference to the record, that Oracle's Stock Option Plan provides that where an optionee has a written agreement governing the employment relationship, "the working 'relationship is [only] terminable in accordance with the terms of any agreement you have with the company governing the relationship.'" Pet. at 5; *see also* Pet. at 7 n.6. There is a simple reason why Petitioner offers no record cite for the quoted material—the Plan says no such thing. In his petition for rehearing in the Ninth Circuit, Petitioner claimed that the same quotation is derived from Paragraph 47 of the Questions & Answers accompanying the Stock Option Plan. That paragraph, quoted in full, says:

> 47. **Is a grant of an Award under the Plan a guarantee of continued employment by the Company?**
>
> No. Neither the Plan nor any Award under the Plan imposes any obligation upon you or the Company to continue your relationship with the Company. If you are an employee or officer, such relationship is terminable at will by you or the Company. *If you are a consultant or adviser, such relation is terminable in accordance with the terms of any agreement you have with the Company governing the relationship.* If you are a director, such relationship is terminable in accordance with applicable corporate laws.

(2:ER345, emphasis added.)

Thus, the sentence from which Petitioner selectively quotes unambiguously *applies only to consultants and advisors*—a critical limitation that Mr. Falotti omits in his Petition—and has no applicability whatsoever to him. Instead, the immediately preceding sentence—which Petitioner does not

mention—makes clear that, as an officer and employee, Mr. Falotti's employment was *terminable at will*.

2. Petitioner's assertions that his employment agreement with Oracle Switzerland incorporated certain provisions of Swiss law (Pet. at 3) and that he had "acquired contractual and legal rights guaranteeing him continued employment" (Pet. at 9 n.10, 16) misrepresent both his contract and the applicable provisions of Swiss law. The parties merely agreed that the Swiss employment agreement, which covered part of his salary and fringe benefits, would be *subject to* Swiss law. Pet., App. A at 3a. Under Swiss law, Mr. Falotti would have a right of action to recover the wages and benefits he otherwise would have earned under his employment agreement with Oracle Switzerland if Oracle Switzerland failed to honor an applicable notice or "protected" period.[2] *See* Pet., App. A at 8a-9a. Swiss law did not guarantee him continued active employment or reinstatement to his former position.

3. Petitioner's characterization of his termination as "unlawful" (Pet. at 5-6) equally misstates Swiss law. As Mr. Falotti's own expert witness on Swiss law affirmed, an employee may be immediately relieved of duties and excluded from the workplace. 11:ER3020-23. Therefore, Oracle irrevocably ended Petitioner's status as a full-time employee on May 31, 2000 in a manner that was entirely consistent with Swiss law.

4. Petitioner's assertion that the courts below never found legal justification for Respondent's alleged breaches of Mr. Falotti's employment agreement with Oracle Switzerland

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[2] The notice period under Swiss law provides a period of continued salary and benefits payments after notice of termination as a means of support while the individual seeks other employment. The "protected" period may extend the applicable notice period up to 90 days if an individual is unable to work due to illness. Pet., App. B at 34a-35a, citing Articles 335c and 336c of the Swiss Code of Obligations.

(Pet. at 6 n.4) is incomplete and misleading. Far from "acknowledging" any breach of Petitioner's Swiss-law employment agreement, Respondent has vigorously disputed Mr. Falotti's claim to have suddenly become totally disabled one day before he knew he was going to be replaced as Executive Vice President. The district court held that there were substantial disputes of material fact precluding summary judgment as to whether Mr. Falotti "was ever in fact incapacitated," noting that "[s]ome of the circumstances surrounding his reported illness support an inference that he was not sick" and that he "recovered suddenly after Oracle had requested an independent medical examination." Pet., App. B at 55a-56a. The Ninth Circuit found it unnecessary to resolve the question because the Stock Option Agreement did not in any event entitle him to vest in stock options after he ceased to perform any services for any Oracle entity. Pet., App. A at 9a; *see also* Pet., App. B at 52a. Thus, neither court found that Oracle breached any obligation to Petitioner under Swiss law.

5. Petitioner fails to mention that the parties' Swiss-law employment agreement of September 10, 1996 specifically stated that, in the event of conflict between the July 1996 Letter Agreement and Swiss law, the July 1996 Letter Agreement would control. Pet., App. A at 4a. As noted above, the July 1996 Letter Agreement provided that Petitioner was terminable at will, with or without cause. *See* p. 2, *supra.*

6. Petitioner's assertion that "[t]he only distinction between Falotti and his contemporaneously terminated co-workers was that Oracle had granted an exponentially larger number of stock options to Falotti than to them" (Pet. at 8 n.8) omits critical facts. As the district court correctly found, all but one of these former co-workers received stock options as part of settlement agreements compromising their severance benefit claims (Pet., App. B at 38a-39a); this fact clearly distinguishes these former employees from Petitioner, who

rejected such a settlement (10:ER2501-02). As to the one other former employee, both the Ninth Circuit and the district court found that the Compensation Committee's determination in that case was entirely consistent with its determination in Petitioner's case. Pet., App. A at 16a-17a, App. B at 38a.[3]

7. Petitioner omits mention of the proceeding he initiated against Oracle Switzerland before the Juridiction des Prud'hommes in Geneva, Switzerland, shortly after Respondent filed this declaratory judgment action. In that proceeding, Petitioner is pursuing the exact same claims for stock options (or their value in damages) that he is pursuing here as well as claims for salary and benefits under his employment agreement with Oracle Switzerland. Notwithstanding his arguments about principles of "international comity" in this case, Petitioner has taken the position in that case that the Swiss courts should ignore the Ninth Circuit's decision *in toto*.

ARGUMENT

This case is about Petitioner's claimed entitlement to continue to vest in Oracle stock options after he was notified of his termination and relieved of his duties. Petitioner, who was a very senior executive of Respondent, exercised $80 million worth of Oracle stock options tax-free during his tenure and sought $85 million more in this action. While the case is thus of considerable monetary importance to Petitioner and Respondent, it is unique and fact-bound. The decision below is one of straight-forward contract interpretation where

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[3] There likewise is no record support for Petitioner's assertion that "Oracle's written policy had previously been 'not [to] dispute any entitlement to options vesting during notice' periods." Pet. at 8. The quoted material is taken out of context from a series of questions and answers accompanying letters sent to selected European managers, in which Respondent proposed certain modifications to their employment contracts. *See* Pet., App. B at 41a.

the contract governing stock options was fully integrated and specifically elected California law. The case was in federal court solely on the basis of diversity jurisdiction, and the questions presented by the Petition were not raised below. Four judges (the district court and the unanimous Ninth Circuit panel), including two sitting in California, agreed on the outcome, and no active Ninth Circuit judge voted for a poll on Petitioner's suggestion for rehearing *en banc*. Petitioner has not identified any valid reason why this Court should review the Court of Appeals' decision.

I. THE QUESTIONS PRESENTED BY THE PETITION WERE NOT RAISED BELOW AND WOULD NOT HAVE AFFECTED THE COURT OF APPEALS' DECISION.

A. Petitioner Did Not Assert Principles Of "International Comity" In The Proceedings Below.

Notwithstanding Petitioner's attempt to conjure up a cert-worthy issue, neither the Ninth Circuit's actual ruling nor the record below raises the questions presented by the Petition. Indeed, while Petitioner now claims that this Court's "international comity doctrine" is fundamental to his case, neither the phrase "international comity" nor any of the cases cited in the Petition to support this argument appear anywhere in Petitioner's Opening Brief, Reply Brief or Petition for Rehearing and Suggestion for Rehearing En Banc in the Ninth Circuit. Nor do they appear anywhere in the Ninth Circuit's opinion.[4]

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[4] At most, Petitioner argued in his Motion to Dismiss Plaintiff's First Amended Complaint for Lack of Personal Jurisdiction that the district court should stay its proceedings under an asserted doctrine of "international abstention" pending the outcome of his subsequently-filed claims for the exact same stock options (or their value in damages) in Switzerland. 1:ER148-150. The district court rejected Petitioner's argument and no appeal was taken from that decision. 1:ER264-68.

Because the questions presented by the Petition were not advanced in the proceedings below and were not addressed by the Ninth Circuit, they should not be considered by this Court. *United States v. United Foods, Inc.*, 533 U.S. 413, 416-17 (2001) (refusing to consider new substantive arguments attacking a judgment that were not pressed below or passed on by the Court of Appeals). *See also, e.g., Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981) (question presented in petition but not raised in court of appeals "is not properly before us"); *Youakim v. Miller,* 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

B. The Ninth Circuit's Decision Turns On California Law And Application Of Principles Of "International Comity" Would Have Had No Impact On The Outcome.

Even if Petitioner's failure to raise any issue of "international comity" in the proceedings below did not bar review by this Court, the questions presented by the Petition do not warrant such review. While cloaked in the guise of "international comity," Petitioner's real objection is that the Ninth Circuit misconstrued California law.[5] Thus, he contends that California law obliged the Compensation Committee to give effect to certain provisions of Swiss law providing protection for terminated employees. Pet. at 18. He claims that his Swiss employment rights affected his status as "*a purely at-will employee* in California." Pet. at 11, 13, 16, 18, 20, 23.[6] He contends that "in applying California law

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[5] Petitioner conceded in the district court that the stock option agreement was governed by California law. *See* Pet., App. B at 35a. ("[a]s both sides acknowledge, the stock-option agreement was governed by California law.")

[6] Petitioner's repeated assertions that the Ninth Circuit erred by treating him as a "*purely at-will employee* in California" reflect nothing more than his disagreement with that court's factual findings and its application of

under the stock option plan both the Compensation Committee and the Ninth Circuit" were required to consider Mr. Falotti's employment status for purposes of the Stock Option Agreement as modified by his Swiss employment contract. Pet. at 18-19. Finally, he contends that the Ninth Circuit improperly allowed the Compensation Committee to ignore "controlling California law and contractual right." Pet. at 25. An interpretation of California contract law is not a "federal case," much less a decision implicating principles of "international comity."

Furthermore, contrary to Petitioner's contention (Pet. at 20-25), there is no reason to believe that the application of principles of "international comity" would have been outcome-determinative. As noted above, Petitioner repeatedly conceded in the proceedings below that neither his employment agreement with Oracle Switzerland nor Swiss law gave him any right to stock options. *See* p. 3, *supra.* Indeed, as both lower courts found, Petitioner's employment agreement with Oracle Switzerland *does not mention stock options at all*, an intentional omission upon which Mr. Falotti himself insisted, presumably to avoid taxes. *See* p. 3, *supra.* Accordingly, "enforcement" of Petitioner's employment agreement with Oracle Switzerland and the notice provisions of Swiss employment law would not have changed the Ninth Circuit's decision in this case in any way.

II. THE COURT OF APPEALS' DECISION WAS CORRECT AND DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioner's basic argument here, as in the courts below, is that the additional stock options he seeks would automatically have vested if Respondent had honored the allegedly applicable Swiss-law notice provisions. Pet. at 9 n.10. But,

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settled principles of California law to those facts. Such disagreements do not warrant this Court's review. Sup. Ct. R. 10.

as the Ninth Circuit correctly pointed out, that simply is not true. Pet., App. A at 9a. Even if Mr. Falotti were entitled to Swiss-law notice periods, that would only have entitled him to payment of the salary and fringe benefits provided under his Swiss employment agreement. It would not have entitled him to stock options, which the Ninth Circuit found to be governed by an entirely separate contract. *Id.*

This conclusion was demonstrably correct given that (i) the July 1996 Letter Agreement stated that stock options, if granted, would be "issued under a written agreement" (7:ER1901); (ii) the resulting Stock Option Agreement contained an integration clause stating that the Stock Option Agreement "constitutes my entire agreement with the Company and supersedes all prior undertakings and agreements between us" with respect to stock options (7:ER1954 ¶ 9); and (iii) Petitioner's employment agreement with Oracle Switzerland does not mention stock options (*see* p. 3, *supra*).

The Ninth Circuit also properly recognized that, in the Stock Option Agreement, Respondent had bargained for its right to retain discretion to determine—under California law—when employment ceased. Pet. at 12a. Otherwise, a multi-national corporation like Respondent, with employees all over the world, could not administer a stock option incentive program in a uniform manner, leaving employees' entitlement to stock options dependent on the vagaries of local employment laws in dozens of different countries. In these circumstances, the Ninth Circuit found that honoring a clearly-expressed choice-of-law provision was fully consistent with its precedents. *See* Pet., App. A at 10a. Nothing in its decision warrants this Court's review.

III. THE PETITION DOES NOT SATISFY THIS COURT'S STANDARDS FOR REVIEW ON WRIT OF CERTIORARI.

A. The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeals Or Any State Court Of Final Resort.

Petitioner has identified no conflict between the decision below and any decision of another United States Court of Appeals or a state court of last resort on an important federal question. *See* Sup. Ct. R. 10(a). Petitioner's allegations of conflict with another Ninth Circuit decision and an intermediate California state appellate court decision, even if they had merit, would not meet this Court's stringent standards for review.

At most, Petitioner erroneously suggests that there is a conflict between the Ninth Circuit's decision below and its decision in *McGhee v. Arabian American Oil Co.*, 871 F.2d 1412 (9th Cir. 1989). In *McGhee*, however, the Ninth Circuit found, and the parties agreed, that contract provisions expressly incorporating Saudi Arabian employment law supplanted language in the contract calling for termination at will. *Id.* at 1417. Here, by contrast, Petitioner's employment agreement with Oracle was terminable at will, with or without cause, and Swiss law provided him no right to reinstatement. *See* pp. 2, 5, *supra.* Accordingly, even if an intra-circuit conflict were ground for granting certiorari, there is no conflict between *McGhee* and the Ninth Circuit's decision below.[7]

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[7] Petitioner first suggested a conflict between the Ninth Circuit's decision in this case and its decision in *McGhee* in his Petition for Rehearing and Suggestion for Rehearing En Banc. The lack of any actual conflict is underscored by the fact that no Ninth Circuit judge even requested a vote on whether to rehear this case *en banc*. Pet., App. C at 64a.

Petitioner's reliance upon the California Court of Appeals decision in *Bertero v. National General Corp.*, 254 Cal. App. 2d 126, 62 Cal. Rptr. 714 (1967) (Pet. at 25), likewise fails to create any issue worthy of this Court's time or attention. Like the decision below, *Bertero* involved nothing more than that court's interpretation of the terms of the particular contract at issue in that case. As the district court observed, the case had nothing to do with stock option vesting after notice of termination and, unlike Mr. Falotti, the employee in *Bertero* was terminable only for cause. Pet., App. B at 37a. Therefore, even if *Bertero* had been decided by the California Supreme Court and even if it had involved an "important question of federal law," it is factually distinguishable and provides no ground for review of this case by this Court. *See* Sup. Ct. R. 10(a)—(c).

B. The Decision Below Does Not Have Any Far-Reaching Importance.

Petitioner asserts that "American courts are increasingly confronted with business disputes between multinational corporations and their foreign based employees" and that "[q]uite often stock option plans are at the heart of these disputes." Pet. at 2. If there are any such stock option cases apart from this one, the Petition fails to cite them. Even if there were any other such cases, however, they would involve a different stock option contract and a different set of facts.[8] Petitioner's attempt to create an "important federal question" out of this straight-forward case of contract interpretation amounts to nothing more than a disagreement with the Ninth Circuit's well-reasoned application of settled state law to the particular facts of his case.

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[8] Indeed, as Petitioner notes, Oracle has amended its Stock Option Plan since the events giving rise to this dispute. *See* Pet. at 12 n.13. This Court's review, therefore, would be unlikely to have any impact beyond the parties to this specific dispute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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